

No. 76-1555

Supreme Court, U. S.

FILED

JUL 12 1977

MICHAEL RUDAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1977

BASIN, INC., PETITIONER

v.

FEDERAL ENERGY ADMINISTRATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
TEMPORARY EMERGENCY COURT OF APPEALS
OF THE UNITED STATES

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The opinion of the Temporary Emergency Court of Appeals (Pet. App. 21-34) is reported at 552 F. 2d 931. The opinion and order of the United States District Court for the Western District of Texas (Pet. App. 8-20) are not officially reported. An earlier opinion of the Temporary Emergency Court of Appeals (Pet. App. 1-7) is reported at 534 F. 2d 324.¹

JURISDICTION

The judgment of the Temporary Emergency Court of Appeals was entered on March 7, 1977; petitioner's request for rehearing, with a suggestion for rehearing *en banc*, was denied on April 18, 1977. The petition for a writ of certiorari was filed on May 9, 1977. The jurisdiction of this Court is invoked under 15 U.S.C. (Supp. V) 754(a)(1).

¹Petitioner, in its appendix, has altered the opinions below by italicizing and setting into bold print portions that were not so emphasized in the original texts.

QUESTION PRESENTED

Whether 10 C.F.R. 211.63 of the regulations of the Federal Energy Administration, "Domestic Crude Oil Supplier/Purchaser Relationships," is arbitrary, capricious, or an abuse of discretion.

STATUTE AND REGULATION INVOLVED

Sections 2, 4(a), and 4(b)(1) of the Emergency Petroleum Allocation Act of 1973, 87 Stat. 627, 629, as amended, 15 U.S.C. (Supp. V) 751, 753(a), and 753(b)(1), and 10 C.F.R. 211.63 are set forth in the Appendix, *infra*, pp. 1a-9a.²

STATEMENT

1. Congress enacted the Emergency Petroleum Allocation Act of 1973 in response to shortages of crude oil and other petroleum products that threatened severe economic dislocations and that would "jeopardize the normal flow of commerce and constitute a national energy crisis * * *." Section 2(a) of the Act, 15 U.S.C. (Supp. V) 751(a). As stated in Section 2(b), 15 U.S.C. (Supp. V) 751(b), the purpose of the Act was "to grant to the President of the United States and direct him to exercise specific temporary authority to deal with shortages of crude oil, residual fuel oil, and refined petroleum products or dislocations in their national distribution system." Section 4(a) of the Act, 15 U.S.C. (Supp. V) 753(a), specifically directs the President to "promulgate a regulation providing for the mandatory allocation of" petroleum products, and Section 4(b)(1)(D) sets forth nine goals that, "to the maximum extent practicable," the regulation is to meet, including the preservation of "the competitive viability of independent refiners, small refiners, nonbranded independent marketers, and branded independent marketers." 15 U.S.C. (Supp. V) 753(b)(1)(D).

²The 1973 Act was superseded in part by the Emergency Petroleum Allocation Act of 1975, Pub. L. 94-99, 89 Stat. 481, the relevant provisions of which are not materially different for the purposes of this case.

In response to the statutory directive, the President, through the Federal Energy Administration and its predecessor, the Federal Energy Office, promulgated a regulation, known as the "purchaser/supplier freeze rule," designed to prevent dislocations in the national distribution system and to maintain the competitive viability of small refiners and marketers. 10 C.F.R. 211.63 (App., *infra*, pp. 3a-9a). As originally promulgated, the regulation provided generally that (10 C.F.R. 211.63(b) (1974)):

All supplier/purchaser relationships in effect under contracts for sales, purchases, and exchanges of domestic crude oil on December 1, 1973, shall remain in effect for the duration of this program * * *.³

The rule permits present purchasers to elect to terminate the supplier-purchaser relationship and provides a number of other conditions under which such relationships may be terminated, such as the refusal of a present purchaser "to meet any bona fide written offer made by another purchaser * * * at a lawful price above the price paid by the present purchaser." 10 C.F.R. 211.63(d)(i) and (d)(iii). The regulation also permits, under certain conditions, the substitution of new marketers ("resellers") of petroleum products for existing marketers. 10 C.F.R. 211.63(d)(iv).

2. Petitioner began its business of marketing crude oil in October 1973 (Pet. App. 8). By January 1974, petitioner had secured commitments from suppliers for approximately one

³As originally promulgated, the regulation froze supplier-purchaser relationships in effect on December 1, 1973. The regulation currently in effect, promulgated under the authority of the Emergency Petroleum Allocation Act of 1975, Pub. L. 94-99, 89 Stat. 481, freezes those relationships in effect on January 1, 1976 (App., *infra*, p. 4a). Although petitioner's challenge is necessarily to the validity of the regulation currently in effect, the change in dates is not material to the issue in this case. See Pet. 4, n. 2.

million barrels of oil per month (Pet. App. 8-10). The promulgation of the supplier-purchaser rule on January 14, 1974 (39 Fed. Reg. 1924) had the effect of depriving petitioner of approximately 75% of the supply of oil for which it had received commitments.⁴

Petitioner brought this suit to enjoin the application of the rule to it on the ground, *inter alia*, that the regulation was arbitrary, capricious, and an abuse of discretion. The district court granted petitioner's motion for a preliminary injunction. The court of appeals vacated the preliminary injunction, noted certain intervening revisions and proposed revisions of the regulations (Pet. App. 1-7), and remanded the case for an expedited hearing on the merits. The district court then conducted a trial and, at its conclusion, permanently enjoined the Federal Energy Administration from enforcing the regulation against petitioner, on the ground, *inter alia*, that the regulation effectively eliminated recent entrants into the crude oil marketing business and that "there are no compelling circumstances to justify that elimination * * *" (Pet. App. 18).

The Temporary Emergency Court of Appeals reversed (Pet. App. 21-34). The court, following its decision in *Condor Operating Company v. Sawhill*, 514 F. 2d 351,

⁴The district court found that petitioner had commitments for a million barrels of oil on December 1, 1973, but that "deliveries had begun by that date from only approximately 25% of those commitments" (Pet. App. 8-9). The relationship between supplier and purchaser to which the regulation refers is created not by contractual rights to future supplies but by the actual flow of oil from a supplier to a purchaser on a particular date. See 41 Fed. Reg. 7386; *Condor Operating Company v. Sawhill*, 514 F. 2d 351 (T.E.C.A.), certiorari denied *sub nom. Condor Operating Co., et al. v. Zarb, et al.*, 421 U.S. 976. Accordingly, as the district court found, the regulation's freezing of relationships existing on December 1, 1973, served to preclude petitioner from receiving 75% of the oil for which it had commitments at that time (Pet. App. 10).

certiorari denied *sub nom. Condor Operating Co., et al. v. Zarb, et al.*, 421 U.S. 976, held that the regulation was a rational and permissible exercise of the Administrator's delegated authority. The court held that the rule reasonably effectuates the statutory purpose to protect small and independent refiners from having their supplies terminated by major, integrated companies that might otherwise divert their supplies to their own operations in times of shortage. The court also found that the rule fosters competition, provides for equitable distribution of petroleum products, and minimizes inflexibility and interference with market mechanisms (Pet. App. 28-30).

ARGUMENT

The court below correctly upheld the supplier-purchaser rule and further review is not warranted. There is no conflict among the circuits or within the Temporary Emergency Court of Appeals on this issue; indeed the court expressly followed its earlier decision in *Condor Operating Company v. Sawhill, supra*, upholding the regulation. Apart from objecting to the impact of the regulation on its operations, petitioner advances no reasons to support its contention that the regulation is unlawful, or to refute the court's conclusion that the regulation reasonably and effectively serves the various purposes of the Act.

1. Petitioner contends primarily (Pet. 12-17) that the court below employed an erroneous standard of review when it held (Pet. App. 25, quoting from *Condor Operating Company v. Sawhill, supra*, 514 F. 2d at 359), "[w]here the obvious intent of Congress is to give the President and his delegates broad power to do what-reasonably is necessary by a recognized emergency * * *, the court should not interfere with the prerogative of the agency to select the remedy which for rational reasons is deemed most appropriate." Petitioner claims to perceive a difference between that standard and the standard set forth in the Administrative Procedure Act, 5 U.S.C. 706(2), and the review provisions of Section 5 of the Allocation Act, 15 U.S.C. (Supp. V) 754.

There is no difference. It is a fundamental principle of administrative law, articulated in innumerable cases, that an administrative regulation designed to effectuate a statutory objective is valid if there is a discernible rational basis for the agency's action. See, e.g., *Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 285-286; Davis, *Administrative Law Treatise*, §30.05 (1970 Supp.). Agency action that has a rational basis by definition is not arbitrary, capricious, or an abuse of discretion. As the Court said in *Bowman Transportation, Inc.*, "we can discern in the Commission's opinion a rational basis for its treatment of the evidence, and the 'arbitrary and capricious' test does not require more." 419 U.S. at 290. In short, there is no substance to petitioner's objection to the court's phrasing of the standard of review.⁵

2. Although petitioner alleges that the regulation will prevent it from remaining in the crude oil marketing business (Pet. 17-18), it does not address or refute the court of appeals' reasons for concluding the regulation is a lawful exercise of the Administrator's delegated authority.

As the court noted, the Emergency Petroleum Allocation Act of 1973 provided broad authority to the President and

⁵Similarly, there is no basis for petitioner's contention (Pet. 16) that the court erroneously changed the standard of review from its earlier opinion, vacating the preliminary injunction, in which the court indicated that "any governmental action that will effectively eliminate relatively recent comers from an industry calls for critical scrutiny and can be justified only by a clear showing of compelling circumstances" (Pet. 6). Although we know of no rule of administrative law requiring an agency to advance compelling circumstances to sustain an otherwise rational regulation, the final decision of the court below reflects a critical scrutiny and identifies compelling circumstances justifying the supplier-purchaser regulation. Moreover, as the court below stated (Pet. App. 25, n. 4), the court's earlier statement was "dictum * * * made without the benefit of a full justification by FEA of its actions, and certainly cannot be interpreted as calling for a change in the standard of review of administrative action."

his delegates to allocate petroleum products and otherwise deal with the imminent and severe shortages in those products. The Act provided that regulations were to serve nine general objectives "to the maximum extent practicable," 15 U.S.C. (Supp. V) 753(b)(1), and thus, as the court stated (Pet. App. 27), "indicate[d] that a considerable degree of flexibility was intended by Congress and was incorporated into the Act." Indeed, the legislative history of the Act demonstrates that Congress encouraged adoption of a supplier-purchaser freeze rule. The conference report on the bill, H. R. Conf. Rep. No. 93-628, 93d Cong., 1st Sess. 24 (1973), stated: "It is expected that the President's regulation will in most cases merely confirm existing supply relationships." See also S. Rep. No. 93-159, 93d Cong., 1st Sess. (1973); H. R. Rep. No. 93-531, 93d Cong., 1st Sess. (1973).

The freeze rule adopted is a reasonable means of achieving the objectives specified in the Act. As the court below stated (Pet. App. 28), "[i]t is uncontested that the supplier-purchaser rule stabilizes the distribution system and greatly helps to protect the sources of supply of the small, independent refiners" and thus enables small refiners to maintain their competitive viability in the industry.⁶ Moreover, the court noted that the "substantial exceptions" to the rule "demonstrate an attempt by FEA to aid the new resellers, without harming the refiners" and "further support[] the reasonableness of FEA's approach" (Pet. App. 32-33).

⁶The district court expressed the view that the existing "buy-sell" program (10 C.F.R. 211.65) was adequate to protect small refiners without the supplier-purchaser freeze rule (Pet. App. 16). But the court of appeals correctly sustained (Pet. App. 30-32) as reasonable the Administrator's conclusion that the buy-sell program, which requires the monitoring of innumerable individual transactions, could not provide effective protection in the absence of the freeze rule.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 1977.

DOJ-1977-07

APPENDIX

**Emergency Petroleum Allocation Act of 1973, 87
Stat. 627, as amended, 15 U.S.C. (Supp. V)
751 et seq.**

P.L. 93-159, November 27, 1973

As amended by P. L. 93-511, P. L. 94-99,
P. L. 94-133, P. L. 94-163, P. L. 94-385.

*Be it enacted by the Senate and House of Representatives
of the United States of America in Congress assembled,
That this Act may be cited as the "Emergency Petroleum
Allocation Act of 1973."*

FINDINGS AND PURPOSE

Sec. 2. (a) The Congress hereby determines that—

(1) shortages of crude oil, residual fuel oil, and refined petroleum products caused by inadequate domestic production, environmental constraints, and the unavailability of imports sufficient to satisfy domestic demand, now exist or are imminent;

(2) such shortages have created or will create severe economic dislocations and hardships, including loss of jobs, closing of factories and businesses, reduction of crop plantings and harvesting, and curtailment of vital public services, including the transportation of food and other essential goods; and

(3) such hardships and dislocations jeopardize the normal flow of commerce and constitute a national energy crisis which is a threat to the public health, safety, and welfare and can be averted or minimized most efficiently and effectively through prompt action by the Executive branch of Government.

(b) The purpose of this Act is to grant to the President of the United States and direct him to exercise specific temporary authority to deal with shortages of crude oil, residual fuel oil, and refined petroleum products or dislocations in their national distribution system. The authority granted under this Act shall be exercised for the purpose of minimizing the adverse impacts of such shortages or dislocations on the American people and the domestic economy.

MANDATORY ALLOCATION

Sec. 4. (a) Not later than fifteen days after the date of enactment of this Act, the President shall promulgate a regulation providing for the mandatory allocation of crude oil, residual fuel oil, and each refined petroleum product, in amounts specified in (or determined in a manner prescribed by) and at prices specified in (or determined in a manner prescribed by) such regulation. Subject to subsection (d), such regulation shall take effect not later than fifteen days after its promulgation. Such regulation shall apply to all crude oil, residual fuel oil, and refined petroleum products produced in or imported into the United States.

(b)(1) The regulation under subsection (a), to the maximum extent practicable, shall provide for—

(A) protection of public health (including the production of pharmaceuticals), safety and welfare (including maintenance of residential heating, such as individual homes, apartments, and similar occupied dwelling units), and the national defense;

(B) maintenance of all public services (including facilities and services provided by municipally, cooperatively, or investor owned utilities or by any State or local government or authority, and including transportation facilities and services which serve the public at large);

(C) maintenance of agricultural operations, including farming, ranching, dairy, and fishing activities, and services directly related thereto;

(D) preservation of an economically sound and competitive petroleum industry; including the priority needs to restore and foster competition in the producing, refining, distribution, marketing, and petrochemical sectors of such industry, and to preserve the competitive viability of independent refiners, small refiners, nonbranded independent marketers, and branded independent marketers;

(E) the allocation of suitable types, grades and quality of crude oil to refineries in the United States to permit such refineries to operate at full capacity;

(F) equitable distribution of crude oil, residual fuel oil, and refined petroleum products at equitable prices among all regions and areas of the United States and sectors of the petroleum industry, including independent refiners, small refiners, nonbranded independent marketers, branded independent marketers, and among all users;

(G) allocation of residual fuel oil and refined petroleum products in such amounts and in such manner as may be necessary for the maintenance of, exploration for, and production or extraction of—

(i) fuels, and

(ii) minerals essential to the requirements of the United States,

and for required transportation related thereto;

(H) economic efficiency; and

(I) minimization of economic distortion, inflexibility, and unnecessary interference with market mechanisms.

10 C.F.R. 211.63 (1974), 41 Fed. Reg. 24340-24341 *Domestic crude oil supplier/purchaser relationships*.

(a) *Scope*. This section provides for the allocation of crude oil produced in the United States other than crude oil which is the subject of (1) purchases and sales made to comply with 211.65 of this subpart; (2) sales of crude oil made pursuant to Parts 225 and 225a, Chapter II of Title 30 of the Code of Federal Regulations; (3) the first sale of crude oil under 10 U.S.C. 7430(b), as amended by 201 of the Naval Petroleum Reserves Production Act of 1976; and (4) the first sale of any domestic crude oil produced and sold from a property from which domestic crude oil was not produced and sold prior to January 1, 1976.

(b) *General rule*. (1) All supplier/purchaser relationships in effect under contracts for sales, purchases and exchanges of domestic crude oil on January 1, 1976 shall remain in effect for the duration of this program; *Provided, however*, that any such supplier/purchaser relationship to which this section is applicable may be terminated as provided in paragraph (d) of this section.

(2) Once any first sale, purchase or exchange of domestic crude oil is made which is exempt from this rule pursuant to paragraph(a)(4) of this section, or once the sale, purchase or exchange of any domestic crude oil that has at any time been the subject of a supplier/purchaser relationship under paragraph (b)(1) of this section is made in accordance with this section to a firm that was not the purchaser thereof on January 1, 1976, or has not continued to purchase that crude oil without interruption since December 31, 1975, a supplier/purchaser relationship between the seller and purchaser shall be established thereafter under this section as though it had been in effect on January 1, 1976.

(3) The provisions of this paragraph (b) shall not (i) operate to validate any supplier/purchaser relationship in effect on January 1, 1976 where the purchaser of the domestic crude oil involved was not the lawful purchaser thereof under the provisions of this section as in effect at any time prior to February 12, 1976, or (ii) impair any purchaser's rights under this section as in effect prior to February 12, 1976, including a purchaser's right to continue to receive the volumes of domestic crude oil flowing to it on December 1, 1973 or such later date at which its supplier/purchaser relationship was established under this section as in effect prior to February 12, 1976.

(c) *Supply obligations and purchase rights*. (1) Obligations and rights incident to supplier/purchaser relationships under this section applicable to domestic crude oil production from a property (as defined in Part 212) in a given month shall not exceed the actual production of that property for the month.

(2) Where the volume of domestic crude oil produced by a property in a given month is below December 1975 levels, the supply obligations under this section for that production shall be reduced for that month as to each January 1, 1976 purchaser of that production on a pro-rata basis, based on the respective volumes purchased by each such purchaser in December 1975.

(3) Increased production of domestic crude oil from a property over December 1975 production levels shall be sold proportionately to the same purchaser or purchasers that are entitled to purchase the December 1975 levels of domestic crude oil production of that property under this section.

(4) In the event that a property which produces crude oil subject to this section is transferred to a new owner, the obligation to supply the January 1, 1976 purchasers of that property's crude oil production shall attach to the new owner and new supplier/purchaser relationships subject to this section shall be established on that basis.

(5) In the event that a refinery to which crude oil subject to this section is supplied is transferred to a new owner, the right to purchase such crude oil shall for purposes of this section be transferred to the new owner of the refinery and a new supplier/purchaser relationship subject to this section shall be established on that basis.

(d) Termination of supplier/purchaser relationships.

(1) Any supplier/purchaser relationship established under paragraph (b) of this section may be terminated as follows:

(i) At the option of the purchaser, as evidenced by its written consent thereto together with notice of the termination date given to the producer, provided all subsequent purchasers of the crude oil involved have consented to such termination in writing;

(ii) By a producer with respect to any crude oil produced from a stripper well lease (as defined in 212.74 of Part 212 of this chapter), provided that the production from a stripper well lease is upon termination immediately sold or sold for resale to any small refiner and continuously thereafter supplied to that small refiner purchaser for processing by that small refiner; and

(iii) By a producer (as defined in Part 212 of this chapter), if the present purchaser as to any old, new or stripper well lease crude oil (as defined in 212.72 and 212.74 of Part 212 of this chapter) refuses, within a fifteen day period after receipt of written notice as to that offer from the producer, to meet any bona fide written offer made by another purchaser to purchase such crude oil at a lawful price above the price paid by the present purchaser.

(iv) By a producer (as defined in Part 212 of this chapter) or reseller as to a reseller purchasing from it, *Provided, that;*

(A) At least forty-five days in advance of any termination under this clause (iv), the producer or reseller shall give to a reseller purchasing from it whose supplier/purchaser relationship is proposed to be terminated a written termination notice stating the date of termination, the source and estimated volume of crude oil involved (including the portion of that volume that is priced as lower tier crude oil under Part 212 of this chapter), and the name and address of the new reseller to which such crude oil is proposed to be sold;

(B) Any reseller that has received a termination notice from a producer or reseller as provided in subclause (A) of this clause, which proposed termination would effect a reduction in deliveries of crude oil to any refiner shall, within 15 days thereafter, provide a copy of that notice to any such refiner and advise the proposed new reseller as to the identity of the refiner or refiners to which copies of the termination notice were so provided;

(C) The refiners notified under subclause (B) above shall be those refiners that received, either directly or through exchanges, the crude oil involved in the termination, and, if the crude oil involved in the termination is commingled with other crude oil and cannot be traced directly to a particular refiner, all refiners receiving crude oil from the commingled inventory shall be so notified;

(D) The proposed new reseller of that crude oil shall obtain from the refiner or refiners that received a copy of the termination notice their written consent to the proposed supplier substitution, except as provided in subclause (F) below;

(E) Any consent of a refiner under subclause (D) above may be upon such terms and conditions as shall be agreed

upon between the parties, provided such terms and conditions are consistent with the provisions of Parts 211 and 212 of this chapter;

(F) The consent of a refiner required under subclause (D) shall not be necessary to effect a termination if (I) the proposed new reseller offers to supply the crude oil involved in the proposed termination to that refiner and (II) the transportation and handling charges for that crude oil involved agreed to by the proposed new reseller with the refiner do not exceed the transportation and handling charges to the refiner for that crude oil of the reseller whose supplier/purchaser relationship is proposed to be terminated;

(G) If a refiner is unable to determine the exact amount of the transportation and handling charges attributable to the crude oil involved in the proposed termination so that the refiner may make a determination as to whether the transportation and handling charges of the proposed new reseller do not exceed the transportation and handling charges of the present reseller for the particular crude oil involved, the refiner shall within ten days request the amount of these charges from the reseller whose supplier/purchaser relationships is proposed to be terminated;

(H) Upon request of a refiner in accordance with subclause (G) above, any reseller whose supplier/purchaser relationship is proposed to be terminated as to crude oil supplied to that refiner shall supply within ten days to that refiner the amount of the transportation and handling charges of that reseller for the crude oil involved in the proposed termination; and

(I) The provisions of this clause (iv) shall not permit any refiner to terminate or consent to the termination of a crude oil supplier/purchaser relationship if the termination would result in that refiner, or any affiliated entity, becoming the new purchaser of the crude oil involved, whether directly or through exchange.

(2) Nothing in this paragraph (d) shall be construed as authorizing any firm to terminate a supplier/purchaser relationship in breach of a contract or agreement it may have with another firm.